(9)

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition filed by the Florida Democratic Party (the "FDP") is long on rhetoric, but it contains no effective response to petitioner's compelling showing that certiorari is warranted in this case.

I. This Court's Immediate Review Of The Federal Questions Squarely Presented In This Case Is Necessary And Appropriate

The FDP cannot and does not dispute that the exceedingly important nature of this case provides a powerful justification for review by this Court. Opp. 3. Indeed, even the courts below emphasized the unique importance and significance of this proceeding, characterizing the case as one of "great public importance requiring immediate resolution" and "extraordinary importance." Pet. App. 2a, 37a. Nonetheless, the FDP asserts (Opp. 2-3, 14-15) that principles of federalism and public policy militate against review. The FDP's assertions are without merit.

The FDP's repeated reliance on principles of "federalism" is particularly misplaced. This Court has repeatedly recognized the powerful federal interest in the selection of presidential electors. In *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983), for example, the Court held that "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." Thus, the federal Constitution and congressional enactments make clear that state laws regarding the appointment of presidential electors are a matter of *federal* concern. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 2; 3 U.S.C. § 5. These provisions directly refute the FDP's erroneous assertion that petitioner is "attempt[ing] to federalize a state law dispute." Opp. 15. Indeed, the Constitution and federal statutes have already "federalized" numerous matters relating to the appointment of presidential electors, including those at is-

sue here. *See, e.g.*, 3 U.S.C. §§ 1-15; *Anderson*, 460 U.S. 780 (1983); *Buckley v. Valeo*, 424 U.S. 1, 14 n.16 (1976) ("Th[is] Court has also recognized broad congressional power to legislate in connection with the elections of the President and Vice President."); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *Burroughs v. United States*, 290 U.S. 534, 544-48 (1934); *see id.* at 547 ("The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress."); *see also Ex parte Yarbrough*, 110 U.S. 651 (1884).

Title 3, § 5 of the United States Code plainly recognizes a federal interest in the manner in which States resolve "controvers[ies] or contest[s] concerning the appointment of" presidential electors. This statute requires States to resolve any disputes over the appointment of electors by exclusive reference to state laws "enacted prior to" election day. 3 U.S.C. § 5. The decision of the Supreme Court of Florida violates this federal mandate because it attempts to promulgate a new rule of law to govern the present controversy over the appointment of Florida's electors. As a result, and pursuant to *federal* law, the decision below is a nullity with respect to the November 7, 2000, presidential election. No principle of federalism or comity precludes this Court from granting certiorari in order to enforce that federal statutory mandate in this case.[1]

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[1] The FDP errs in suggesting (Opp. 3 n.1) that petitioner's federal claims were not properly preserved below. The appendix to the petition reproduces the relevant excerpts from petitioner's brief below (Pet. App. 62a-64a), in which petitioner clearly and expressly raised the federal questions at issue here. *See also* Pet. 9. The FDP's suggestion that petitioner was obligated to raise these claims in the trial court is mistaken. Under Florida law, petitioner was entitled to defend the judgment on any ground supported in

[Footnote continued on next page]

Thus, the FDP is simply wrong in suggesting (Opp. 2) that the States possess "plenary and exclusive power" over all aspects of the selection of presidential electors. Indeed, this Court rejected that very argument in *Williams v. Rhodes*: "The State also contends that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution .... But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." 393 U.S.at 28-29. The FDP's attempt to immunize the decision below from review is baseless.

Equally without merit is the FDP's suggestion (Opp. 15 & n.4) that this Court's enforcement of 3 U.S.C. § 5 in this case would violate the Tenth Amendment. Indeed, the very cases relied upon by the FDP expressly reject the argument advanced by the FDP in its brief, and instead reaffirm the self-evident proposition that the Tenth Amendment does not limit the power of federal courts to compel state and local officials to comply with

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the record. *See Firestone v. Firestone*, 263 So. 2d 223, 225 (Fla. 1972) (where district court holding was based on erroneous findings, "the judgment may yet be affirmed where appellate review discloses other theories to support it"); *Kirby v. State*, 765 So. 2d 723, 725 n.3 (Fla. Dist. Ct. App. 1999) ("As appellee, it is open to the state to argue for affirmance on any ground the record will support."). Moreover, because the violation of federal law at issue here *resulted* from the decision of the state supreme court, petitioner had no obligation to raise that federal law claim in an anticipatory manner in the trial court. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930).

federal law. *Printz v. United States*, 521 U.S. 898, 931 n.16 (1997); *New York v. United States*, 505 U.S. 144, 179 (1992) ("the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply").

II. Review Is Warranted In This Case Because The Florida Supreme Court Disregarded Federal Law As Enunciated In The Due Process Clause And 3 U.S.C. § 5

Contrary to the FDP's assertions (Opp. 2, 15, 17-18), this case involves much more than a "state law dispute," and instead involves substantial violations of due process and 3 U.S.C. § 5. The FDP's argument rests on the baseless assumption that this Court is absolutely precluded from applying federal law standards to weigh the validity of state court decisions purporting to apply state law.

The federal courts are frequently required to examine state law in determining whether a federal statutory or constitutional provision has been violated, and in such cases the federal courts are not bound by the state courts' characterizations of the federal issue. For example, in applying the Ex Post Facto Clause, this Court has held that the question whether state law has changed in a manner that impermissibly increases the penalties for past conduct is a question of *federal*, not state, law, even though resolution of that question requires a comparative analysis of state law. *Lindsey v. Washington*, 301 U.S. 397, 400 (1937) ("[W]hether the [state-law] standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself."). The question whether a State is attempting to resolve controversies over the appointment of electors by reference to "laws enacted prior to the day fixed for the appointment," or is instead attempting to impose new rules of law retroactively in violation of 3 U.S.C. § 5, is also ultimately a question of federal law.

The FDP appears to contend (Opp. 17) that because the state supreme court's decision discusses Florida laws that existed prior to election day, the court's decision could not have violated 3 U.S.C. § 5. That contention is meritless. Nothing in Florida law prior to November 7 revealed that the seven-day period for certification of election results was in reality a 19-day period, or that the Secretary of State's broad power to enforce the statutory deadline and reject untimely election returns was instead almost nonexistent. Whatever the merit of the Florida Supreme Court's interpretation as a matter of state law, it is clear that *for purposes of federal law* the decision below announces a new and previously nonexistent legal standard applicable to disputes over the appointment of presidential electors.[2]

Even the FDP does not dispute that a change in the law took place. It simply claims that the Florida Supreme Court's decision does not "'change the rules' *in any way that implicates federal law*." Opp. 17 (emphasis added). Under 3 U.S.C. § 5, however, *any* post-election change in the rules governing the appointment of presidential electors implicates—and violates—federal law.

The FDP also errs in contending that so long as the retroactive change in the law was judicially, as opposed

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[2] The FDP asserts that the 5:00 p.m., November 14 deadline was "set by the Secretary of State." Opp. 9. That deadline, however, was established by the Florida Legislature in §§ 102.111 and 102.112 of the Florida Statutes. The only deadline "set" by a body other than the legislature in this matter is the arbitrary 5:00 p.m., November 26 deadline that the Florida Supreme Court chose to establish in its decision below.

to legislatively, imposed, 3 U.S.C. § 5 is satisfied. *See* Opp. 16. The FDP argues in effect that the Florida Legislature granted to the state courts the authority to determine the proper way in which to resolve controversies concerning the appointment of Florida's presidential electors. Under the FDP's theory, no violation of 3 U.S.C. § 5 would occur even if the judicial tribunal deviates from the law as it was established prior to the election, so long as the legislature had granted the courts jurisdiction to resolve such controversies. This argument is without merit. To begin with, such an interpretation of 3 U.S.C. § 5 would render it a virtual nullity. If state legislatures could simply convey authority to a chosen tribunal to create new rules to govern disputes over the appointment of electors, States could easily avoid the limitations placed on them by 3 U.S.C. § 5.

Such a self-defeating construction is also at odds with its legislative history. As Representative Cooper explained in the congressional debate on this statute, "these contests should be decided under and by virtue of laws made prior to the exigency under which they arose." 18 CONG. REC. 47 (1886) (remarks of Rep. Cooper). The clear purpose of 3 U.S.C. § 5 is to prevent States from manipulating their laws after the initial election results are known, regardless of which branch of government is responsible for that change. Indeed, by requiring that the rules governing election disputes be established by "enact[ment]" prior to the election, Congress made clear that state *legislatures*, not the courts, were to establish these rules of law. That approach is entirely in keeping with Congress's desire to avoid retroactive changes that could affect the results of elections. To interpret 3 U.S.C. § 5 in the contrary manner suggested by the FDP would render its protections essentially meaningless.

III. Review Is Warranted Because The Supreme Court of Florida's Decision Is In Contravention of Article II Of The Constitution

As discussed in the petition, Article II of the Constitution reserves to the state *legislatures*, not the state *courts*, the authority to determine the manner in which to appoint presidential electors. *See* U.S. CONST. art. II, § 1, cl. 2. The FDP asserts that because this provision delegates authority to the States, disputes over the appointment of electors must rest exclusively on state law, and thus are not subject to federal court review. *See* Opp. 18. While it is true that the appointment of presidential electors in each State will turn on the laws of the individual States, the suggestion that federal courts have no role in this area is demonstrably incorrect. Where a State's judiciary intrudes upon this constitutional grant of authority to the State legislature by eviscerating a state statutory rule applicable to electoral disputes, federal court review is plainly appropriate. *See McPherson v. Blacker*, 146 U.S. 1, 25-26 (1892) ("the words 'in such manner as the Legislature thereof may direct' . . . operat[e] as a limitation upon the State in respect of *any* attempt to circumscribe the legislative power") (emphasis added).[3]

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[3] For all the reasons set forth in petitioner's reply brief in case number 00-837, the FDP's arguments regarding petitioner's federal constitutional claims under the Equal Protection Clause, the Due Process Clause, and the First Amendment are equally without merit, and this Court's review of those claims is warranted.

CONCLUSION

As this Court recognized in *Burroughs v. United States*, 290 U.S. 534, 545 (1934), "[t]he President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."

For all the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 24, 2000